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# Supreme Court

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# United States

OCTOBER TERM, 1970

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## No. 747

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E. E. MARSHALL, Administrator of the Estate of Mathew A. Marshall, deceased,

*Petitioner,*

*vs.*

HOLLYWOOD, INC., et al,

*Respondent.*

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**BRIEF OF RESPONDENTS, HOLLYWOOD, INC., SHERWOOD INVESTMENT CO., FRANCIS E. KANE AND JOANNA KANE, HIS WIFE, AND ALVIN KOHN, A SINGLE MAN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.**

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### PRELIMINARY STATEMENT

In this brief we will refer to pages in the brief and petition of petitioner as "P.B. __" and to the appendix to the petition and brief of petitioner as "P.A. __".

No appendix is attached to this brief in opposition to granting the petition for certiorari.

## OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Florida sought to be reviewed, *Marshall vs. Hollywood, Inc., et al,* is reported in *236 So.2d 114* (P.A. A).

## JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by virtue of writ of certiorari to the Florida Supreme Court by alleging that the Florida Supreme Court opinion and decision acted as a denial of equal protection of the laws and due process of law to Petitioner in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, Section 1, and United States Code Title 28, Section 1257 (3).

Accordingly, Respondents' brief will be limited to this narrow jurisdictional point raised by Petitioner.

## FLORIDA STATUTE INVOLVED

The State Statute involved in this cause is *Chapter 712, Florida Statutes, Marketable Record Title Act* (P.A. E).

Although Petitioner states that Section 695.01, Florida Statutes (a recording statute relating to constructive notice to creditors and purchasers, P.A. D) is involved, none of the cases cited by Petitioner nor the Florida opinion which is sought to be reviewed refer to Section 695.01, Florida Statutes.

## STATEMENT OF THE CASE

The statement of the case as presented by Petitioner outlines the facts alleged in his complaint which were deemed admitted for the purpose of this cause by Respondents' motion to dismiss, which motion was granted and from which unsuccessful appeals were taken. *Marshall vs. Hollywood, Inc., et al, Fourth District Court of Appeal of Florida, 224 So.2d 743*, and *Marshall vs. Hollywood, Inc., et al, Supreme Court of Florida, 236 So.2d 114.*

## STAGE OF THE PROCEEDINGS WHICH RAISED FEDERAL QUESTION

Petitioner admits that the Federal question was raised for the first time in his petition for rehearing filed with the Clerk of the Supreme Court of Florida on May 28, 1970, a copy of which is annexed to Petitioner's appendix (P.A. B).

The Federal question raised by Petitioner was not timely raised, and is without merit as hereinafter stated.

## ARGUMENT AMPLIFYING REASONS WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

I. *The Federal question was not timely raised* where same has been presented for the first time in a petition for rehearing to the Florida Supreme Court.

Petitioner has failed to come within the guidelines for the granting of a writ of certiorari under such circumstances as announced by this Court in *Herndon vs. Georgia,*

*55 S.Ct. 794, 295 U.S. 441, 79 L.ED. 1530, 1532.* The Georgia statute was assailed as contravening the due process clause, and this Court observed as follows:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."
> * * *
>
> "Petitioner, however, contends that the present case falls within an exception to the rule — namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."
> * * *
>
> *"The whole point, therefore, is whether the ruling here assailed should have been anticipated."*

Petitioner's request for rehearing (P.A. B) for the first time raised the matter of the application of the Constitution of the United States to Petitioner's cause; the

Supreme Court of Florida denied same without opinion. (P.A. C).

Accordingly, the Supreme Court of Florida never entertained any Federal question and made no attempt to decide it.

The Petitioner cannot claim that he comes within the exception to the above rule by claiming that the ruling of the State Supreme Court could not have been anticipated prior to the petition for rehearing.

Petitioner states that the Federal question first became apparent as the result of the opinion of the State Supreme Court in that it refused to follow previous decisions construing certain statutes other than the one herein involved, Chapter 712, the Marketable Record Title Act, and that it also placed a completely unanticipated and unconstitutional construction upon the Marketable Record Title Act.

The former opinions of the Supreme Court of Florida which Petitioner says it refused to follow are:

*Wright vs. Blocker, (1940), 198 So. 88, (P.B. 7) Poladian vs. Johnson (1955), 85 So.2d 140 (P.B. 8) Reed vs. Fain (1962, 145 So.2d 858, (P.B. 8).*

The record in this cause affirmatively shows to the contrary.

Petitioner's petition for rehearing (P.A. B, 18) shows that Petitioner had argued the application of these three cases in his oral argument before the Supreme Court of Florida:

> "If this Court will remember, at the oral argument, I stated that in order for the Court to decide in favor of the Respondents, the Court must recede from its Opinions in Reid v. Fain, Poladian v. Johnson and Wright v. Blocker."

The opinion of the Fourth District Court of Appeal, *Marshall vs. Hollywood, Inc., 224 So.2d 743, at page 750*, (P.A. F, 44), considered the case of *Wright vs. Blocker*, supra, and *Reed vs. Fain*, supra, at the intermediate appellate level. The opinion of the Supreme Court of Florida, after observing Petitioner's contentions that the Marketable Record Title Act must be construed in light of decisions prior to the enactment of said statute observed:

> "As examples, petitioner cites Reed v. Fain, 145 So.2d 858 (Fla. 1961, rev'd on rehearing, 1962); Poladian v. Johnson, 85 So.2d 140 (Fla. 1955); and Wright v. Blocker, 144 Fla. 428, 198 So. 88 (1940)."
>
> * * *
>
> "The answer to this argument is simply that the Act in question goes beyond previous enactments and is in a category of its own."
> *Marshall vs. Hollywood, Inc., 236 So.2d 114, p. 119* (P.A. A, 11 and 12).

Accordingly, it is apparent from the record brought to this Court that Petitioner not only anticipated but argued the construction of these same previous decisions of the Florida Supreme Court, and cannot now be heard to say that the present opinion had surprised him in its construction of the decisions of these prior cases.

II. *Petitioner has not been denied equal protection of the law.*

Petitioner quotes from the case of *Great Northern Ry. Co. vs. Sunburst Oil and Refining Co. (1932), 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360* (P.B. 6, 7) to the effect that a statute cannot be adjudged to mean one thing for some cases and another thing for others.

The Florida Supreme Court opinion below was the first time that Court had ever construed the Marketable Record Title Act, Chapter 712, Florida Statutes, and for this reason Petitioner cannot claim that it was construed one way for one person and another way for another person, because it is the only time it has been construed. Accordingly, Petitioner does not show that he has been denied equal protection of the laws.

III. *The Florida Supreme Court's construction of the Marketable Record Title Act is not a denial of due process of law.*

The Florida Supreme Court opinion in construing the Marketable Record Title Act in *Marshall vs. Hollywood, Inc., 236 So.2d 114*, begins on page 115 (P.A. A, 4 and 5):

> "We now review an application of the Marketable Record Titles to Real Property Act, Chapter 712, Florida Statutes."

It was the first time that the Marketable Record Title Act had been construed by the Florida Supreme Court, and had been considered one of great public interest and

certified by the Fourth District Court of Appeal to the Supreme Court of Florida so as to give it jurisdiction to pass upon the initial application and interpretation of the Marketable Record Title Act.

This Court early determined in *Osborne vs. State of Florida, 17 S.Ct. 214, 164 U.S. 650, 41 L.Ed. 586:*

> "The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state."

Petitioner cites *Brinkerhoff-Faris Co. vs. Hill (1930), 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107.* At page 1113 of the Law Edition, this Court has determined:

> "*It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state;* that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, *does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*"

Petitioner states that the Florida cases of *Wright vs. Blocker, 198 So. 88, Poladian vs. Johnson, 85 So.2d 140,* and *Reed vs. Fain, 145 So.2d 858* (P.B. 7, 8), interpret the

recording statute (Section 695.01, Florida Statutes) attached as P.A. D. A reading of these cases will indicate that a twenty year curative statute (Section 95.23) was involved in *Wright vs. Blocker* and *Reed vs. Fain*, infra, and not the recording statute relating to defining constructive notice to purchasers and creditors (Section 695.01, Florida Statutes). *Poladian vs. Johnson*, infra, does not purport to construe any statute by designation.

In any event, none of these cases attempted to construe the Marketable Record Title Act, Chapter 712, Florida Statutes, which was passed in 1963 and subsequent to such decisions, and certainly cannot be the basis of a claim that the Supreme Court of Florida has construed the Marketable Record Title Act other than as set forth in the opinion below.

Section 712.10, Florida Statutes (P.A. E 32) reads:

> "712.10 Law to be liberally construed.—This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in §712.02 subject only to such limitations as appear in §712.03."

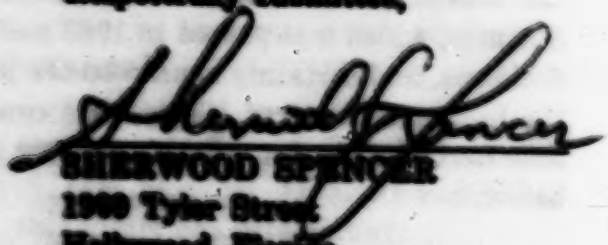
The decision of the Supreme Court of Florida in construing the Marketable Record Title Act is binding on all persons, and its decision does not confer appellate jurisdiction on this Court.

## CONCLUSION

Wherefore, your Respondents respectfully show that Petitioner has failed to invoke jurisdictional grounds for the issuance of a writ of certiorari in this cause, and that his petition for writ of certiorari to the Supreme Court of Florida should be denied.

DATED at Hollywood, Florida, October 2, 1970.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, I have this 27th day of October, 1970, mailed copies of the foregoing Brief of Respondents in opposition to Petitioner's petition to each of the attorneys of record listed below, and on the following page.

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